IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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Civil Action No. 7973(1)

McGRAW ELECTRIC COMPANY, ET AL., APPELLANTS

*vs.*

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

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**MOTION TO AFFIRM**

Pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from the final judgment entered on April 2, 1954, by a specially constituted three-judge district court convened pursuant to 27 U.S.C. 2284, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on May 12, 1954, and the appeal papers were served on appellees on May 13, 1954.

Appellants filed a complaint with the Commission in April, 1948, alleging that rail rates on certain electric fuses which they manufactured

and shipped were unreasonable, unjustly discriminatory and inapplicable, and asking the Commission to prescribe lawful rates for the future and to award reparations. The gravamen of the complaint was that appellants' cartridge and knife blade type fuses had been improperly classified as "fuses, noibn" (not otherwise indexed by name) instead of as "fuse plugs," a category with lower rates. Appellants also contended that the lower rate provided in the tariffs for certain electrical appliances or parts was applicable to their fuses.

The Commission, with the consent of the parties, followed its "shortened procedure" under which all the evidence was submitted in written form, and no testimony was taken. The examiner filed a proposed report and, at the request of the parties, oral argument on exceptions thereto was had before Division 3. At the opening of the argument, it was announced that Commissioner Johnson (one of the members of the Division) was unavoidably absent, but that he would read the transcript of the argument and participate in the decision. No objection was made to this procedure, and the argument was heard by the other members of Division 3, Commissioners Miller and Cross.

While the case was under submission, Commissioner Miller died, and Commissioner Patterson was assigned to Division 3. The parties were then notified that the case had been resubmitted to the reconstituted Division. No objection was made, and shortly thereafter the Commission issued its decision.

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The Commission (*per* Division 3) found that the classification ratings of appellants' fuses had not been shown to be unreasonable, and dismissed the complaint.[1] 277 I. C. C. 5. Noting that there was no "absolute test" of the reasonableness of a rating, it pointed out that the challenged classifications had been in effect for many years without complaint, that fuses which carried the lower rate were "somewhat lighter and much less valuable" than the higher rated "fuses, noibn," and that value and weight were "important elements" in determining a reasonable classification rating (*id.*, pp. 9-10). The Commission rejected appellants' contention that their fuses should be classified as parts of electrical appliances. It held that there had been no showing that the fuses were shipped with, and as parts of, such appliances, or that they were manufactured to specification for use with particular appliances or machines. *Id.*, pp. 8-9. Finally, the Commission held that there had been no proof of unjust discrimination. *Id.*, p. 6.[2]

Appellants filed a petition for rehearing in which they raised, *inter alia*, the objection that they had been denied a fair hearing because a majority of the members of Division 3 who had decided the case had not sat at the oral argument. The full

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[1] The Commission also vacated its suspension of the railroads' proposed change in the wording of the tariff, designed to eliminate certain ambiguities.

[2] Commissioner Cross, the only Commissioner who both sat at the oral argument and participated in the decision, dissented in part.

Commission denied the petition, four Commissioners dissenting.

The district court unanimously sustained the Commission's order. On the procedural issue, the court held that appellants had had a fair hearing. The court noted that the parties had waived their right to present oral evidence and to cross-examine their adversaries' witnesses by consenting to the "shortened procedure"; that under such procedure oral argument is discretionary with the Commission; that no objection was made at the argument to the absence of one of the Commissioners; that such argument was heard by a majority of the Division; and that both the transcript of the argument and the evidence were before the members of Division 3 who decided the case.

On the merits, the court held that in this case the meaning of the tariff was a mixed question of law and fact, and that although the evidence on that issue was conflicting, the Commission's findings thereon were supported by substantial evidence. The court further held that the reasonableness of the ratings of appellants' fuses was a matter within the Commission's expert judgment, and that in exercising such judgment the Commission had not "ignored its own rulings or improperly applied the law." The court stated that the Commission had correctly held that there had been no proof of unjust discrimination, since no discrimination *between different shippers* had been shown.[3] Finally, the court held that appellants'

[3] *Wight* v. *United States*, 167 U. S. 512.

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other contentions were not properly before it because they had not been made before the Commission.

Appellants' principal contention is that they were denied a fair hearing because only one of the Commissioners who sat at the oral argument participated in the decision by Division 3. We submit, however, that the procedure in this case fully complied with the requirements of the Interstate Commerce Act, and did not abridge any of appellants' procedural rights.

Pursuant to the Commission's statutory authority to conduct its proceedings "in such manner as will best conduce to the proper dispatch of business and to the ends of justice" (Section 17 (3)), the Commission has adopted a "shortened procedure" under which all the evidence is submitted in written form and no testimony is taken. Under that procedure, which was followed in this case with appellants' consent, oral argument is allowed by the Commission as a matter of discretion. Thus, appellants would have had no due process complaint in this case if the Commission had denied the requests for oral argument and had decided the case directly on the exceptions to the examiner's report. *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439 (C.A. 3), certiorari denied, 342 U.S. 868; cf. *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 275-276. Indeed, it is by no means clear that oral argument would be required in this type of case even if the shortened procedure had not been followed. *WJR* case, *supra*.

The procedure which the Commission followed in the argument and decision of this case fully complied with the Act. Section 17(3) provides that two Commissioners constitute a quorum of a division. One of the two Commissioners who heard the argument participated in the decision. The third member of Division 3, although he did not sit at the argument, read the transcript before deciding the case, and appellants did not object to his participation under those circumstances. Thus, a quorum of the Division heard argument "either by being physically present or by reading the record and transcript" "before final decision was made." *Sisto* v. *Civil Aeronautics Board*, 179 F. 2d 47, 54 (C.A.D.C.). In the *Sisto* case, the statute required the Board to "hear or receive" argument upon request of either party, and provided that three members of the Board constituted a quorum. Only two members were present at the argument, but a third participated in the decision after reading the record and transcript. The court sustained this practice against the challenge that there had been a denial of a fair hearing because a quorum had not heard the argument. If such practice is proper where the Act required argument, *a fortiori* it is proper where the grant or denial of argument is within the agency's discretion.[4] Cf. *Eastland*

[4] *Ayrshire Collieries Corp.* v. *United States*, 331 U. S., 132, cited by appellants as a "pertinent analogy," is not in point. That case held that, under the Urgent Deficiencies Act, 28 U.S.C. 2325, which required applications to enjoin Commission orders to be "heard and determined" by three judges, a judgment based on a determination by only two judges (after

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*Co.* v. *Federal Communications Commission,* 92 F. 2d 467 (C.A.D.C.), certiorari denied, 302 U.S. 735.

On the substantive issues of the case, appellants make a number of arguments as to why the Commission erred in holding that the classification of their fuses as "fuse plugs" instead of as "fuses, noibn" was proper. These arguments were fully considered and rejected in the careful opinion of the district court, and they present no question of sufficient substance to justify further review by this Court.

Thus, appellants contend that the district court erred in holding that construction of the tariffs in question presented a mixed question of law and fact upon which the Commission's findings were conclusive if supported by substantial evidence, rather than a question of law which the district court itself should have decided *de novo.* While construction of a tariff sometimes may present only a question of law, see *Standard Oil Co.* v. *United States,* 283 U. S. 235, 238, the meaning of technical and industrial terms, such as the electrical terms involved in the instant case, frequently presents questions of law and fact which are "inextricably mixed." *Old Colony Furniture Co.* v. *United States,* 95 F. Supp. 507, 510 (D. Mass.); *Texas & P. Ry. Co.* v. *American Tie & Timber Co.,* 234 U. S. 138; *Standard Oil* case, *supra,* p. 239.

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a hearing before three) was void. In reaching this conclusion, the Court termed it "significant" that the Act made "no provision for a quorum of less than three judges" (p. 138). In the instant case, on the other hand, the Act specifically provides for a quorum of two Commissioners.

Appellants make a number of attacks on the evidentiary basis of the Commission's findings. These are fully answered by the district court. Appellants also again raise several issues which the district court properly refused to consider because they had not been presented initially to the Commission. *General Transp. Co.* v. *United States*, 65 F. Supp. 981, 984 (D. Mass.), affirmed, 329 U. S. 668.

For the foregoing reasons, we submit that this appeal presents no substantial question. The judgment of the district court should therefore be affirmed.

Respectfully submitted,

SIMON E. SOBELOFF,
*Solicitor General,*

EDWARD M. REIDY,
*Chief Counsel,*
*Interstate Commerce Commission.*

MAY, 1954.

CERTIFICATE OF SERVICE

I certify that I have this date served copies of the attached Motion to Affirm upon Arthur J. Freund, 506 Olive Street, St. Louis 1, Missouri, counsel for appellants, and upon Edward R. Gustafson and Leo P. Day, 652 Union Station, Chicago 6, Illinois, and Richmond C. Coburn, Ambassador Building, St. Louis 1, Missouri, counsel for appellees The Akron, Canton &

Youngstown Railroad Company *et al.*, by causing copies thereof to be mailed to them at their respective addresses.

DANIEL M. FRIEDMAN,
*Special Assistant to*
*the Attorney General.*

MAY 26, 1954.

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